J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 89/70.

BEFORE: The Hon. Mr. Justice Fox
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

R E G I N A - v. HERMAN SPENCE

27th September, 1971
1st October, 1971

Miss Beverly Walters for the applicant
Mr. C. A. Harris for the Crown.

FOX, J.A.,

How far is the court bound by the note which the shorthand writer takes of proceedings at a trial? That is the broad question posed in this appeal. The court must accept and act upon the shorthand note as it has been transcribed; but to this general rule, there are exceptions. If a mistake is discovered in the making of the note, or if the note is admitted to be inaccurate, the court is not bound by it. This accords with common sense, and is supported by authority (vide R. v. Edric Martin 20 CR. A.R. p.103). Neither position obtains in this appeal however. No error has been discovered, and no inaccuracy admitted. To the contrary, we have been told by counsel for the crown that the transcript of the particular page of the summing-up which is in question, reproduces correctly the shorthand writer's note which she made at the trial. So the precise form in which the question posed above is presented in this appeal, is whether there are any other exceptions to the rule that the court is bound by the transcript, in addition to the two identified above. In our view, one further exception can be confidently asserted. If it is obvious that there is mistake or error in the transcript, so that the court is able to feel entirely satisfied that the printed record does not represent what had

transpired at the trial, or what had been said, the court is not bound by the note as transcribed.

No rule can be stated, and no principle defined whereby the obviousness of mistake or error may be ascertained. This must be determined in the light of the particular circumstances in each case. In this case the circumstances are as follow: In the course of a summing-up at the trial of the appellant and another accused person at the Montego Bay Circuit for warehouse breaking and larceny of tyres and receiving, the judge left to the jury, the question of accomplice vel non with respect to the principal witness for the crown. This witness, Anthony Dillon, was a taxi-driver. The gist of his evidence was that at about 3.00 a.m. on the 13th June, 1970, he had used a van to assist the accused and others to remove a quantity of tyres from a dump near to the warehouse to a lane in Montego Bay, and that when the police came to him later that day, he had given information which led to the recovery of eight tyres. Curtis Earle, the manager of the warehouse, identified these eight tyres as some of the stolen tyres. Earle also gave evidence of the breaking of the warehouse on the night of 12th June, and of the quantity and value of the missing tyres.

In the course of his general directions to the jury, the judge said this:

> "If you are satisfied that Dillon is an accomplice then, Mr. foreman and members of the jury, it is my duty to tell you that although you can convict on the evidence of an accomplice it is dangerous and unsafe to do so unless the evidence is corroborated; and at the outset and at this time of my summing-up Mr. foreman and members of the jury, I will tell you that there is no corroboration in this case and there is no evidence that the crown has led which you could consider is capable of corroborating the evidence of Dillon. So you will bear in mind that it is dangerous and unsafe to convict the accused without corroboration.....
> Although I have told you it is dangerous and unsafe to convict

the accused unless the evidence of the accomplice is corroborated, it is also open to you to convict the accused even though there is no corroboration if you are quite sure that the witness is speaking the truth, but bear in mind that I say it is dangerous and unsafe to convict the accused on the evidence of an accomplice."

Then followed this passage which has given rise to the complaint on appeal:

> "Mr. Earle told you that the ware-house was broken into and the tyres stolen, that is evidence direct or circumstantial which implicates the prisoners, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed but also the evidence that the prisoners committed it, and so you bear in mind, Mr. foreman and members of the jury when you come to consider the evidence in this case in particular the evidence of Anthony Dillon."

Ex facie this passage contains a serious misdirection, which if it had in fact been given, must have misled and confused the jury on a crucial aspect of the case. This was the burden of the complaint on appeal. Is there therefore an obvious mistake or error in the transcript?

The first point to notice is that the judge told the jury in the clearest possible terms that there was no evidence in the case which was capable of corroborating the evidence of Dillon. It is more than strange, it is really incredible that immediately thereafter, in the very next breath, he should have gone on not only to tell the jury the opposite of what he had just said, but to point out as corroborative evidence, matters which were manifestly not so, to the extent that no lawyer, however inexperienced, could have thought that they were capable of affording corroboration.

The second point to notice is that the evidence of Earle obviously went no further than to show that "the warehouse was broken into and the tyres stolen", and to identify the tyres in court as some of the missing tyres. In the detailed review of

the evidence of Earle to which the judge proceeded immediately after making the questioned statement, discussion was confined to these matters. There was no suggestion that Earle corroborated Dillon, and nothing in the nature of a direction as to the manner in which Earle's evidence could have been capable of corroborating Dillon. Such a direction would certainly have been given if immediately prior to the detailed review of Earle's evidence, the judge had indeed told the jury that Earle's evidence that:

"the warehouse was broken into and the tyres stolen"

was evidence which implicated the prisoners.

The third point to notice is that the statement:

"that is evidence, direct or circumstantial, which implicates the prisoners, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed but also the evidence that the prisoners committed it"

is a reproduction of the second part of the sentence which is employed in Archbold to describe the characteristics of corroborative evidence. (See Archbold 37th Edition paragraph 1296). At that stage of the summing-up the judge was not reviewing the evidence. He was making observations on the law. It is therefore logical and consistent to think that what in fact the judge did suggest to the jury was that Earle's evidence did not fulfil the requirements of corroborative evidence, and that under the pressure of taking a shorthand note of the summing-up, a garbled account was produced.

The fourth and perhaps most weighty point to emphasize is that neither crown counsel nor counsel for the other accused noticed anything amiss in what the judge had said. The error is so glaring that, if it had been made, it is impossible to think that it could have escaped the attention of both counsel, or that having been noticed by them, they could have failed to point it out to the judge.

In the light of these considerations we feel sure that the transcript contains an obvious error as to what in fact the judge said. The court is not bound by it. We are satisfied that there was no misdirection. The complaint on appeal is without substance. The appeal is dismissed. The conviction and sentence are affirmed.